Office - Supreme
FILE
NOV 4

No. 80-1199

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE AMERICAN TOBACCO COMPANY, ET AL.,
PETITIONERS

v.

JOHN PATTERSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

REX E. LEE
Solicitor General
WM. BRADFORD REYNOLDS
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
DAVID A. STRAUSS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CONSTANCE L. DUPRE
Acting General Counsel
PHILIP B. SKLOVER
Acting Associate General Counsel
VELLA M. FINK
Assistant General Counsel
WILLIAM H. NG
Attorney
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

QUESTION PRESENTED

Whether Section 703(h) of the Civil Rights
of 1964 protected petitioners' decision to
racially discriminatory lines of employee progre
from a timely challenge.

TABLE OF CONTENTS

Opinions below .....

Jurisdiction .....

Statement .....

Summary of argument .....

Argument:

I. Section 703(h) does not bar a timely chall to the post-Act adoption of an aspect of a se ity system .....

A. This case presents a challenge to the a tion, not the operation, of the lines of gression .....

B. By its terms, Section 703(h) does not ex the decision to adopt an aspect of a seni system from Title VII .....

C. Immunizing the decision to adopt an as of a seniority system from timely chall would not serve the purposes of Se 703(h) and would thwart the central poses of Title VII .....

II. Petitioners' lines of progression are not a l fide aspect of a seniority system .....

Conclusion .....

TABLE OF AUTHORITIES

Cases:

Alabama Power Co. v. *Davis*, 431 U.S. 581 .....
Albemarle Paper Co. v. *Moody*, 422 U.S. 405.....
Alexander v. *Aero Lodge No. 735*, 565 F.2d 1
cert. denied, 436 U.S. 946 .....

Cases—Continued

Alexander v. *Gardner-Denver Co.*,
Alexander v. *Louisiana*, 405 U.S. (
Bartmess v. *Drewrys U.S.A., Inc.*,
California Brewers Association v. *
598 26,
Carson v. *American Brands, In*
(Feb. 25, 1981) .....
Chardon v. *Fernandez*, No. 81-249
Christiansburg Garment Co. v. *E*
412 .....
Chromocraft Corp. v. *EEOC*, 465
Dandridge v. *Williams*, 397 U.S. 47
Dayton Board of Education v. *Bri*
526 .....
Delaware State College v. *Ricks*, 44
Dothard v. *Rawlinson*, 433 U.S. 32
Emporium Capwell Co. v. *Western*
munity Association, 420 U.S. 50 .
Ford Motor Co. v. *Hoffman*, 345 U.
Franks v. *Bowman Transportatio*
747 .....
Furnco Construction Corp. v. *W*
567 .....
Griggs v. *Duke Power Co.*, 401 U.S.

Hameed v. *International Associa*
Workers, Local 396, 637 F.2d 50
Hankerson v. *North Carolina*, 432
Humphrey v. *Moore*, 375 U.S. 335 .
Hunter v. *Westinghouse Electric* (
267 .....
International Brotherhood of Tean
States, 431 U.S. 324.....9, 18, 2

*International Union of Electrical *
ins & Myers, Inc., 429 U.S. 229 .
Jersey Central Power & Light C
IBEW, 508 F.2d 687 .....

Cases—Continued

Laffey v. *Northwest Airlines, Inc.*, 567
cert. denied, 434 U.S. 1086 .....
Local Lodge No. 1424, International Ass
Machinists v. *NLRB*, 362 U.S. 411 ....
McDonnell Douglas Corp. v. *Green*, 411
Mohasco Corp. v. *Silver*, 447 U.S. 807 ..
Nashville Gas Co. v. *Satty*, 434 U.S. 136
Newman v. *Piggie Park Enterprises,*
U.S. 400 .....
Occidental Life Insurance Co. v. *EEOC*
355 .....
Old Colony Trust Co. v. *Commissioner*
379 .....
Personnel Administrator of Massach
Feeney, 442 U.S. 256 .....
Pettway v. *American Cast Iron Pipe Co.*
211 .....
Rosen v. *Public Service Electric & Ga*
F.2d 90 .....
Rowe v. *General Motors Corp.*, 957 F.2d
Sears v. *Bennett*, 645 F.2d 1365, petitio
pending *sub nom. United Transportat*
v. *Sears*, No. 81-221 .....
Trans World Airlines, Inc. v. *Hardison*
63 .....
United Air Lines, Inc. v. *Evans*, 431 U.S
United States v. *Georgia Power Co.*, 634
petition for cert. pending *sub nom.*
IBEW v. *United States*, No. 80-2117 ..
United States v. *Hayes International*
F.2d 112 .....
United States v. *N.L. Industries, Inc.*,
354 .....
United Steelworkers of America v. *Webe*
193 .....
Village of Arlington Heights v. *Metropol*
ing Development Corp., 429 U.S. 252
Washington v. *Davis*, 426 U.S. 229 .....

Statutes and rule:

Civil Rights Act of 1964
2000e *et seq.* .....
Section 703(a)(2), 42
Section 703(c)(2), 42
Section 703(c)(3), 42
Section 703(h), 42 U.
Section 706(b), 2000e
Section 706(e), 42 U.
Section 713(b), 42 U.
78 Stat. 260 .....
Fed. R. Civ. P. 60(b)(5)

Miscellaneous:

Aaron, *Reflections on the forceability of Seniority* Rev. 1532 (1962) .....
110 Cong. Rec. (1964):
p. 486 .....
p. 1518 .....
p. 2726 .....
p. 2804 .....
p. 5094 .....
p. 5423 .....
p. 6549 .....
pp. 6553-6554 .....
p. 6564 .....
p. 6566 .....
p. 7206 .....
p. 7207 .....
p. 7213 .....
pp. 7266-7267 .....
p. 9111 .....
p. 9113 .....
p. 11471 .....
p. 11486 .....
p. 11848 .....
p. 11931 .....
p. 12723 .....

Miscellaneous—Continued

Cooper & Sobol, *Seniority and*
Employment Laws: A Gene
jective Criteria of Hiring
Harv. L. Rev. 1598 (1969) ..
EEOC, *Legislative History of*
of Civil Rights Act of 1964
31 Fed. Reg. 10270 (1966) .....
H.R. 7152, 88th Cong., 2d Sess
H.R. Rep. No. 914, 88th Cong.,

Vaas, *Title VII: Legislative H*
& Com. L. Rev. 431 (1966) ..

In the Supreme Cour

OCTOBER T

No. 8

THE AMERICAN TOBA
PETITI

v.

JOHN PATTE

ON WRIT OF CERTIORARI
COURT OF APPEALS FO

BRIEF
EQUAL EMPLOYMENT OP

OPINION

The en banc decision of
135-184) is reported at 6
of the panel of the court
is reported at 586 F.2d
district court (App. 109-1
at 18 Fair Empl. Prac. Ca
decision of the court of ap
ported at 535 F.2d 257.
district court (App. 2-49,
ported at 11 Fair Empl.
8 Fair Empl. Prac. Cas. (B

(

The judgment
on November 18,
certiorari was file
on June 15, 1981.
on 28 U.S.C. 1254

The Equal En
and the private
which were con
States District
Virginia in 1973.
promotion and se
to low-paid, segre
of the Civil Righ
seq. (App. 2-3).[1]

1. Petitioner
sidiary, the Amer
plants—the "Vir
branch"—in Rich
vided into a pref
and prepares tob
fabrication depa
ished product (
Workers' Interna
182, are the coll
paid production v

---

[1] "App." refers t
"J.A." refers to t
appeals. "Exh. App
the court of appeal

[2] The internation
in the private actio

Both the compa
at least 1963, the
tion involving eve
plants—jobs, cafe
(App. 75). Petiti
gated locals; bla
Local 216, while
white Local 182
assigned to jobs i
cation department
to jobs in the "
partments (App. 7
tion departments
departments (App
blacks in the fabr
manual labor or
App. 33).

Seniority gover
75). Under the s
titioners until 19
each constituted o
tion departments
(App. 75). Thus
one of the predomi
ments to one of t
departments only

In 1963, petitio
ernment procure
discrimination obl
(App. 75; J.A. 2
seniority; instead,
when they transfe
and the Virginia

[3] The union locals
members of the bla
white local. None of
his position (J.A. 20

time, ho
alone to
employee
were not
being ca
tually al
then awa
who appl
ten job d
ployee "
in the op
it" (App
promotio
cancies i
white em
plant ser
cation d
white.[5]

---

[4] At the
appointed
employees
at the Ric
there rema
mately 30
and 1969
haps more
Exh. App.

[5] In the
cation dep
Virginia b
cluded app
the Richm
1968 in th
partment i
58). The
dominantly
the fabric
or cleanin

policy was raci
the court of app

In January
cancies, althou
job description
the company,
and proposed t
gression. The
progression in
lines of progre

Each line of
Apparently no
job in a line
in the "botto

---

[6] Stipulations
that the posting
(App. 21). The
which the compa
In his opening s
said that "the[
set up at a meeti
Penn Truitt, a
and director of
trial that the "
570) at a meeti
(J.A. 571).

The court of
were instituted
made no refere
immaterial to
adopted in Janu

[7] The district
Title VII (App.
this ruling.

[8] Two lines a
page 6, note 9

among employees who had worked in the "bottom
job the one with the most seniority within the pla
would received the "top" job (App. 142-143 n.3
Of the six lines at issue here, four consisted of near
all-white "top" jobs from the fabrication depar
ments linked with nearly all-white "bottom" jo
from the fabrication departments; the other two co
sisted of all-black "top" jobs from the prefabricatio
departments linked with all-black "bottom" jobs fro
the prefabrication departments.[9] The top jobs in t
"white" lines of progression were among the bes
paying jobs in the plants (Exh. App. 155-163). Whi
it appears that more than two-thirds of the en
ployees in the two plants were in a line of progre
sion,[10] very few of these employees were in t

---

[9] The lines of progression at issue here are (App. 21-2
31-32):

1. Learner-adjuster (top)
   Packing or making machine operator, Schmermu
   boxer operator (bottom)
2. Examiner-making (top)
   Catcher (bottom)
3. Examiner-packing (top)
   Line searcher—Schmermund boxers (bottom)
4. Turbine operator (top)
   Boiler operator (bottom)
5. Adt dryer operator (top)
   Assistant adt dryer operator (bottom)
6. Textile dryer operator (top)
   Assistant textile dryer operator (bottom)

Both jobs in lines 5 and 6 were in the fabrication departmen
(Plaintiffs' Exh. 1), and both were all black (Exh. App. 16
161, 171-172). All jobs in the remaining lines were located
the fabrication department and were nearly all white (Ex
App. 25-37, 46-48, 158-160).

[10] In 1973, 646 of the 952 hoursly-paid workers in the tw
branches were in the lines of progression. Only five of the
employees were in the "black" lines. Exh. App. 158-162.

"black" lines (Exh. App. 158-161). At the Virginia branch, which was only 15% black (App. 34-35), approximately four times as many black employees as white employees were outside the lines of progression entirely. At the Richmond branch, which was one-third black (App. 35), approximately six times as many blacks as whites were outside the lines (see Exh. App. 158-162).

Between 1968, when the lines of progression were instituted, and 1973, when these actions were brought, there were approximately 30 vacancies in top jobs in the "white" lines of progression (Exh. App. 38-47). One of those vacancies was filled by a black; the other 120 top positions continued to be held by whites (see Exh. App. 158-161). The bottom jobs in these lines were also predominantly white, despite numerous vacancies (see Exh. App. 38-47, 158-161). No whites held jobs in the "black" lines (see Exh. App. 160-162). Segregation continued in other respects as well; in the two plants' prefabrication departments, for example, approximately 81% and 92% of the hourly-paid production workers were blacks (App. 19, 77).

2. On January 3, 1969, 50 days after the company proposed the establishment of the lines of progression, three black employees (including one of the private respondents) filed charges with the EEOC, alleging that they had been denied seniority and wage benefits because petitioners discriminated on the basis of race.[11] Copies of these charges were served on pe-

---

[11] App. 102, 6-7. Exhs. A-1 to A-20 attached to the Commission's first request for admissions; company's response to the EEOC's first request for admissions.

titioners on February 19, 1969.[12] The Co
found reasonable cause to believe that pe
seniority, wage, and job classification prac
discriminatorily restricted blacks to low pa
regated jobs in violation of Title VII. W
ciliation efforts failed, the Commission bro
action.[13]

After an extensive trial, the district court
petitioners' seniority, promotion, and job c
tion practices violated Title VII (App. 8-
court found that petitioners maintained seni
other employment practices which continued
regation that had been explicitly enforced u
(App. 32). In particular, the court ruled
six lines of progression "perpetuated past di
tion on the basis of * * * race" (App. 32),
cause petitioners offered no business justific
the six lines, the district court held that they
Title VII and enjoined the company and un
using them further (App. 31-32, 57).

In 1976, the court of appeals affirmed.[14]
pressly endorsed the district court's find
"after the effective date of Title VII the com
the union discriminated in the promotiona

---

[12] Exhs. B-1 to B-7 of Commission's first r
admissions; company's response to EEOC's first r
admissions; union's response to EEOC's first r
admissions.

[13] The EEOC also charged petitioners with sex d
tion. The district court upheld this charge (Ap
the court of appeals affirmed (App. 74). There i
to consider the claim of sex discrimination in conne
the lines of progression at issue here.

[14] The court of appeals modified the district cour
(see App. 83, 91) in ways that are not relevant h

of their bargaining agreements" (App. 78). I
ticular, the court agreed with the trial cour
the six lines of progression, the rule req
employees to forfeit their senority if they trans
between branches, the reliance on the subjectiv
uations of white supervisors, and the failure t
written job descriptions all violated Title VII.
respect to jobs in the six lines of progression en
by the district court, the court of appeals note
"[m]ost of these jobs were in the fabrication d
ments. Since black employees had been large
cluded from the fabrication departments, the
few jobs in most of these lines and could not a
despite their seniority" (App. 78-79). In th
spect, the court of appeals ruled, the lines of pr
sion operated "in a manner similar to the [pre
segregated departmental seniority rosters"
79), permitting the company to carry forward
gated employment patterns. This Court denied
tition for a writ of certiorari. See 429 U.S
(1976).

3. In 1977 petitioners moved to vacate th
trict court's 1974 decree.[15] Petitioners relie
marily on *International Brotherhood of Tea*
v. *United States*, 431 U.S. 324, 353-354 (
which held that Section 703(h) of the Civil
Act, 42 U.S.C. 2000e-2(h), exempts certain bo
seniority systems from the provisions of Titl
Petitioners argued, among other things, that
seniority systems, including the six lines of pr
sion, were bona fide and therefore not in violat

---

[15] The company and the union did not identify the b
their motion. The court below treated petitioners' app
as a motion under Rule 60(b)(5) of the Federal R
Civil Procedure (App. 137 n.1).

Title VII. The district court declined order, holding that petitioners' "sen * * * is not a bona fide system und * * * because this system operated ri day of trial in a discriminatory manne had a discriminatory genesis" (App. 11

A panel of the court of appeals "*Teamsters* requires no modification we approved with regard to job descri progression * * * or supervisory appo cause those employment practices were seniority system and therefore did n Section 703(h) (App. 116). The cou then reheard the case en banc and he (h) * * * has no application to [pe lines of progression policy, whether considered a 'seniority system' * * * [b policy was not in effect at American Title VII went into effect" (App. 1 court of appeals concluded that the "l tory of § 703(h) * * * demonstrates intended the immunity accorded senior § 703(h) to run only to those systems the time of Title VII's effective date, routine post-Act applications of such s 143-144). Because the lines of pro instituted in 1968 and thus did not c Act expectations, the court of appeals d the district court's injunction against t progression.[16]

---

[16] The en banc court remanded for a he other things, the bona fides of the rule th forfeited when an employee transferred b (App. 145-146, 147-154).

In dissent, Judge Widener, joined by Judge that the lines of progression were establi

SUMMARY OF ARGUMENT

I. The court of appeals' judgment i in our view its rationale is too broa overlooked the distinction between th *adopt* an aspect of a seniority system sequent employment decisions made in the system. Unlike the court of appea that Section 703(h) protects applicati iority system even if the system, or t aspect of the system, was instituted a tive date of Title VII.

Respondents, however, filed a timely the adoption of petitioners' lines of pro tion 703(h) does not immunize the dec an aspect of a seniority system, when is properly challenged. By interpreting S to protect the application of a seniorit not the decision to adopt an aspect of a tem, the Court can give full force to the policies of that Section without underm tral purpose of Title VII—something S was never intended to do.

1. When petitioners instituted the lin sion, they established a new qualifica "top" jobs; no matter how senior he employee seeking a "top" job had to in a "bottom" job. Because the "botto most desirable lines of progression had ately reserved to whites, the decision lines of progression "operate[d] to 'free quo of prior discriminatory employme (*Griggs* v. *Duke Power Co.*, 401 U

---

effective date of Title VII (App. 161-177) a 703(h) immunizes the post-Act establishme systems in any event (see App. 160 n.1).

(1971)), ensuring that virtu
be promoted to "top" jobs. M
progression now at issue were
ness necessity. It follows that
progression to be instituted w
sistent with a central prohibiti
employers and unions may not
sify" employees "in any way w
tend to deprive any individu
portunities * * * because of *
2000e-2(a)(2).

2. At the same time, neithe
purposes of Section 703(h) re
to adopt the lines of progressi
though the distinction betwee
menting a provision of a collec
ment was established under
Relations Act, on which Tit
Congress drafted Section 703(
ployment decisions made "pur
system; the language of Section
the decision to adopt an aspect
The legislative history demon
cipal purpose of Section 703(h
ployees' seniority "rights"—th
employees acquire on account o
period of time under a senio
challenge to the decision to ad
seniority system, such as res
petitioners' decision to institut
sion, in no way threatens the
occurs before legitimate expe
Indeed, it was the decision
progression which prevented
their seniority "rights" to ob
way, respondents' challenge to

actually vindicated expectation
system.

Petitioners assert that un
adopt such measures as the lin
without regard to the prohibit
will be unable to adapt to ch
But the courts below did not
nary limitation on petitioners.
that petitioners justify the
qualifications imposed by the
policy in the same way they w
employment qualifications that
pose of filling jobs with proper
enced employees. Because em
no expectations in the continue
of progression policy, the ci
policy was part of a seniority
cuse petitioners from having
are not an artificial and unne
ployment with a discriminator

There is, to be sure, substan
ing that Congress considered i
quire employers and unions to
sity for using the seniority
members' conflicting interests
ganize the workplace. But th
at issue here do not serve an
rather, as petitioners acknowl
use of seniority in order to se
ment needs as other employme
undoubtedly be subject to the
VII. There is, therefore, no
decision to adopt the lines of p
prohibitions.

II. The Court may also af
the court of appeals on the al

the lines of progression
therefore not within Se
court, on the basis of its
the case, held that the
was not bona fide; this
by the court of appeals a
the record.

Petitioners maintained
at least 1963. Under pres
cies, they then modified
ostensibly giving black e
obtain jobs previously re
new system they adopte
standardless, subjective
visors. Consequently, the
whites continued to be h
court and the court of a
tion practice was racially

In 1968, petitioners,
the government, shifted
policy. This policy had t
tinuing the same segre
that had previously ex
blacks from the better
company's and the unio
mitment to segregation,
practices that would co
there is a substantial ba
tioners adopted the lines
least in part because it
gated employment patter

Moreover, petitioners
business purposes served
sion at issue here—desp
and every incentive, to
cause the lines did not se

did serve an objective t
long and persistently p
jobs for whites—the di
concluding that the latte
motivated the decision t
sion, rendering them not

ARG

I. SECTION 703(h) DOE
LENGE TO THE P
ASPECT OF A SEN

A. This Case Present
Not the Operation,

1. While the judgmen
correct, its rationale, in
cifically, the court of ap
tion between a challeng
iority system and a challe
Contrary to the court
Section 703(h) applies
tion of an aspect of a s
aspect was instituted af
VII. But Section 703(h)
challenge to the post-Ac
seniority system.

Respondents' claim is
to the adoption, not th
progression. The comp
were adopted on Novem
respondents filed a cha
the statutory charging

[17] Respondents filed their
time the private respondei
generally required charges
alleged violation. 78 Stat. 2

district court enj
applied in makin
those application
dence in support
institute the lines

If respondents
the adoption of
instead challenge
sions made pursu
Section 703(h)
claim. Such a cl
of progression we
or were not bon
adopted after the
interpret Section
to the adoption
thwart the basic
sufficient justific
703(h) or the po
cause respondent

---

now generally requ
with the EEOC "wi
the alleged unlawful
2000e-5(e). See gen
807 (1980). This p
private respondents'
March 24, 1972, th
See, *e.g.*, *Hunter* v.
267 (6th Cir. 1980)
trical Workers v. *Ro*
(1976).

[18] In our view, the
conclusion that the
aspect of petitioners
31 *infra*. Throughou
the en banc court of
of progression are p
the meaning of Sect

adoption of the li
does not require
junction against t
2. By adopting
instituted a new
employees seeking
formerly confined
iority, and whate
ployee had to ha
jobs. Because th
confined to whites
posed by the line
erate[d] to 'freez
natory employmen
Co., 401 U.S. 424,
were promoted to
tion was "not ju
(App. 31-32).
These facts we
1974 and affirmed
and petitioners do
here. It is a cent
that Congress co
(*Christiansburg G*
418 (1978), quoti
prises, Inc., 390 U
Bowman Transpo
(1976))—that an
job qualifications
discrimination wi
See *Dothard* v. *
(1977); *Griggs* v.
Petitioners non
allowed to reinsta
posed by the line
ticular, they claim

an aspect
protected
Section 70
seek; mor
be served–
be disserv
enacted S
plication c
basic objec
and effect.
of Sen. Hu
Teamsters
(1977). I
with the c
our challe
sion while
far-reachi
plicable to
system if
tive date o

---

[19] If a se
adoption bu
See, *e.g.*, *I*
States, *supr*
735, 565 F.
U.S. 946 (
system is a
long as the
Evans, 431
College v.
Northwest
cert. denied
is bona fid
application
after the e
of Section
system is n

B. B
th
S

1. Und
U.S.C. 20
lines of p
ment pra
employer
* * * in a
prive any
otherwise
because o
703(c)(2)
sentially
42 U.S.C
eligibility
held the
employees
rectly "de
of them o
cause peti
ployees in
discrimina
was racia
Power Co
434 U.S. 1

---

[20] It is ve
challenged
that policy
concrete eff
But this did
"classif[ica
ment "oppo
tices or de
specific ben
natory act,
become pai
1981) slip o

2. By contrast, the terms of the Section 703(h) exemption do not cover petitioners' decision to adopt the lines of progression. Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority * * * system * * *." This language addresses only decisions made "pursuant to" a seniority system; here, it would cover, at most, a decision not to promote a particular employee to a top job because he had not worked in a bottom job. The decision to adopt a senority system is, plainly, not a decision made "pursuant to" that system. See generally *Old Colony Trust Co.* v. *Commissioner*, 301 U.S. 379, 383 (1937). Moreover, in order to challenge the decision to adopt the lines of progression, we need not claim that petitioners were "apply[ing] different standards of compensation, or different terms [and] conditions * * * of employment"; under Section 703(a)(2), it suffices that the lines of progression policy classified and limited employees in a way that adversely affected their opportunities.

Congress could have drafted Section 703(h) to refer to decisions to adopt a seniority system, had it

---

employee can—and sometimes must—challenge a decision denying him tenure even while he continues to work for his employer. See *Delaware State College* v. *Ricks*, *supra*. Similarly, active employees may challenge a discriminatory retirement plan. See, *e.g.*, *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1188-1189 (7th Cir. 1971). See also *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90, 94 (3d Cir. 1973). In any event, the adoption of a seniority system in a collective bargaining agreement binds employees in the bargaining unit, and in that sense has an immediate impact on them. See generally *Emporium Capwell Co.* v. *Western Addition Community Association*, 420 U.S. 50 (1975).

wished to do so. The National Labor Relations Act was the model for much of Title VII (see, *e.g.*, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-770 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 & n.11 420 & n.12 (1975)),[21] and the NLRA distinguisnes between the adoption of an unlawful term in a collective bargaining agreement and its subsequent implementation; the Court has held that the adoption may be an unfair labor practice, challengeable only within the statutory charging period, while its implementation is not. See *Local Lodge No. 1424, International Association of Machinists* v. *NLRB*, 362 U.S. 411 (1960). Moreover, members of Congress pointed out that the language of Section 703(a)(2) referring to the "limit[ing]" and "classify[ing]" of employees would cover seniority systems (see, *e.g.*, 110 Cong. Rec. 2726 (1964) (remarks of Rep. Dowdy)), but Congress did not extend Section 703(h) to "limitations" and "classifications"—only to differences in employment conditions that were the result of the application of seniority systems.[22]

---

[21] See also 110 Cong. Rec. 7266-7267 (1964) (remarks of Sen. Ellender); EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, at 7-9 (1964); Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 431 & n.2 (1966).

[22] By its terms Section 703(h) applies only to employers, not to unions. In practice, Section 703(h) can operate to immunize unions as well; for example, Section 703(c)(3) makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section," so union involvement in a practice protected by Section 703(h) cannot by itself give rise to liability under Section 703(c)(3).

But it is nonetheless significant that Congress referred only to employers in drafting Section 703(h). The application of a seniority system, especially insofar as it affects terms and

Thus while Section 703(h) exempts actio
in implementing a seniority system, nothing
tion 703(h) refers to the adoption or instit
a seniority system. Petitioners themselves en
(*e.g.*, Union Br. 11) Senator Dirksen's st
that the language of Title VII "received me
attention. We have tried to be mindful c
word, of every comma, and of the shading
phrase" (110 Cong. Rec. 11935 (1964)). F
reasons, the only conclusion to be drawn f
language is that "the unmistakable pur
§ 703(h) [is] to make clear that the routine
tion of a bona fide seniority system would
unlawful under Title VII." *International*
hood of Teamsters v. *United States*, 431 U
352 (1977) (emphasis added).

**C. Immunizing the Decision to Adopt an A
a Seniority System from Timely Challen
Not Serve the Purposes of Section 703(h) a
Thwart the Central Purposes of Title VI**

1. The distinction between the adoption
application of an aspect of a seniority system
important congressional policies. The legisla
tory shows that the central purpose of Section
was not to ensure that employees and unio
design and adopt whatever sort of seniority
they desired; rather, Section 703(h) was int
protect the expectations employees acquired
continued operation of a seniority system.
words, Section 703(h) rests on a "congressio

---

conditions of employment, is the responsibility of
ployer. By contrast, the decision to adopt a seniorit
or a particular aspect of it, is jointly made by the
and the union. Thus Congress's reference to emplo
is further evidence that Section 703(h) was intende
only the application, not the adoption, of a seniorit

ment * * * that Title VII should not * * * destro water down the vested seniority rights of emplo simply because their employer had engaged in crimination prior to the passage of the Act." *ternational Brotherhood of Teamsters* v. *Un States, supra*, 431 U.S. at 353. A timely challen the adoption of a seniority system does not enda this congressional policy, for it occurs before expectations can develop.

Section 703(h) was added to the Civil Rights in response to criticism by opponents of the Act. *International Brotherhood of Teamsters* v. *Un States, supra*, 431 U.S. at 352.[23] Those oppon repeatedly argued that "Title VII would under the vested rights of seniority" (110 Cong. Rec. (1964) (statement of Sen. Clark, quoting Sen. Hi The minority report of the House Committee favorably reported the bill became the Civil Ri Act charged that Title VII would "seriously

---

[23] Section 703(h) was not part of the bill passed by House, H.R. 7152, 88th Cong., 2d Sess. (1964). See Cong. Rec. 2804 (1964); *Franks* v. *Bowman Transport Co.*, 424 U.S. 747, 759 (1976). That bill was sent direct the Senate floor where it was filibustered; Senators Man and Dirksen eventually submitted a substitute bill that the filibuster. See Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. at 445. Section 703(h) firs peared as part of this substitute bill. 110 Cong. Rec. (1964). Senator Humphrey, one of the drafters of the su tute, explained that Section 703(h) did not alter the mea of Title VII but "merely clarifie[d] its present intent effect." 110 Cong. Rec. 12723 (1964); see *Franks* v. *Bow Transportation Co., supra*, 429 U.S. at 761. Thus, as pet ers implicitly acknowledge, statements of House propo of Title VII about its effects on seniority, and statements by Senate proponents before Section 703(h) was propose evidence of the meaning of Section 703(h).

pair * * * [t]he seniority rights of e
porate and other employment * * *."
914, 88th Cong., 1st Sess. 64-65 (
opponent argued that under Title VII
organized labor has attained through
no longer be matters of 'right' * *
Rec. 486 (1964). Title VII, oppo
would "*destroy union seniority*" whi
valuable asset" (H.R. Rep. No. 914
emphasis in original) and would un
lished seniority" (110 Cong. Rec. 272
ponents of Title VII outside Congress
would "place[] in jeopardy" the "se
union members." See 110 Cong. Re

The bill's defenders answered thes
same vein; they focused on employe
about the continued operation of se
Thus the bill's supporters accused th
attempting to "put [people] in fear
iority" by falsely suggesting that
"seniority systems would be abroga
white men's jobs would be taken and
[blacks]." 110 Cong. Rec. 11471 (1
"a cruel hoax * * * [that] generat
fear among those individuals who
their job or union membership to ma
istence." 110 Cong. Rec. 9113 (196
man of the House committee that r
said: "It has been asserted * * * tha
destroy * * * employee rights vis-a-vi
the employer. This again is wrong."
1518 (1964) (statement of Rep. Celle
proponents explained that "[T]itle V
permit interferences with seniority
ployees or union members." 110 C
(1964). The Senate managers, Sen

and Kuchel, explained that "[t]he full ri
union membership * * * will in no way
(110 Cong. Rec. 6549 (1964) (Sen.
and that "seniority rights [would not] b
this act" (110 Cong. Rec. 6564 (
Kuchel)).

Perhaps the most "authoritative indica
* * * purpose [of Section 703(h)]" (
Brotherhood of Teamsters v. *United S*
431 U.S. at 352) are memoranda subm
the Senate debate by Senators Clark an
theme of those memoranda was that Tit
not interfere with seniority "rights" or
based on seniority systems already estab
operation (110 Cong. Rec. 7207, 7213 (

> [I]t has been asserted that title V
> dermine vested rights of seniority.
> correct. Title VII would have no e
> iority rights existing at the time it
>
> * * * * *
>
> Title VII would have no effect o
> seniority rights. Its effect is pro
> not retrospective.

Thus it seems clear that the principa
Section 703(h) was to make explicit C
tention not to "destroy" the "rights" th
acquired under seniority systems. That
was not to interfere with employees'
that a seniority system, once lawfull
would continue to operate.

This conclusion is subject to two
First, as we will explain (pages 30-3
cannot fairly be said that this was the
of Section 703(h); Congress also recog
portant role that seniority plays in collec
ing, and its historic importance to worl

while Section 703(h) did protec
expectations to some degree, it
expectations entirely from ad
established, for example, that a
may be remedied by an "award
[a victim of discrimniation]
have earned but for the wrongf
"such relief diminishes the e
arguably innocent, employees *
man Transportation Co., supra,

Nonetheless, the legislative h
passing Section 703(h) Congre
was with employees' expectation
tems that were in operation.
the adoption of an aspect of
such as respondents' challenge t
sion—in no way impairs these e
ents challenged the lines of p
they were established.[24] Petitio

---

[24] Judge Widener, dissenting from
the court of appeals, argued that
were adopted before 1965. But J
reference to the company's explicit s
progression were "set up" and "estal
1968. See page 10, note 16 *supra*. In
er's argument was simply that betw
company supervisors were using t
whether an applicant for a job wa
consider, together with a variety of
cant's experience in other jobs in th
This cannot be enough to show that t
progression that were an aspect of
California Brewers Association v. *B*
610 (1980) ("[A] standard that gi
"depart[s] significantly from comm

the challenge within six weeks
could not have justifiably relied
istence of the lines of progres
legitimate expectations based on

'seniority.' "). If Judge Widener's ap
employer could extend Section 703(h)
terion simply by showing that it had
discretionary employment decisions in

[25] Under Section 706(b) of Title
5(b)), added in 1972, notification of a
on the employer and union within 10
the EEOC. Before 1972, the EEOC wa
notice within a reasonable time. See
EEOC, 465 F.2d 745 (5th Cir. 1972).

[26] Some expectations based on the lin
of course, have arisen between the c
clusion of the litigation. But this is an
the litigation runs its course, timely n
lenge to the lines of progression is the
preventing employees from acquiring u
The Court has held that Congress reli
to ensure that litigation delays woul
Occidental Life Insurance Co. v. *EEC*
373 (1977).

Moreover, Congress intended the EE
litigation until it had investigated the
conciliation. See *Occidental Life Ins*
supra, 432 U.S. at 359-360, 368. Vol
conciliation are "the preferred means'
ment discrimination claims (*Alexand*
Co., 415 U.S. 36, 44 (1974); see *Carso*
Inc., No. 79-1236 (Feb. 25, 1981), sl
principal objective of Title VII is to "
and unions to self-examine and to self
ment practices * * *.' " *Albemarle Pa*
U.S. 405, 417-418 (1975), quoting *Unit*
tries, Inc., 479 F.2d 354, 379 (8th Cir.
done so, or had they been willing

cidental Life Insurance
371-372 (1977).

In fact, when the lin
lished they interposed a
had to be met by emplo
iority to obtain a bette
instituted, employees wi
forward to obtaining o
lines of progression we
and white alike—found
who had served in bott
jobs instead. In this wa
of progression frustrat
tions. Respondents' ch
tually helped restore pr
Thus once respondents'
the adoption, not the
progression policy, ther
that it is inconsistent
703(h).

2. Petitioners assert
pany Br. 30, 32) that u
preted to permit them
gression, their ability

---

respondents, no unwarran
veloped.

In any event, the dange
ranted expectations in the
l: ies of progression is far l
system that is not bona f
since such a system may
challenged; yet Congress cl
to aspects of seniority syst
over, courts retain the po
way that avoids inequity. S
tion Co., supra, 424 U.S.

promoted—and otherwis
response to changing ci
sively and unjustifiably
low did not impose an
dented limitation on pet
Petitioners' lines of
that, as an additional pr
holding a "top" job, an
designated "bottom" job.
tioners the benefit of S
require that they justify
they would justify any
tion—by showing, under
supra, 401 U.S. at 431,
an "artificial, arbitrary,
to employment * * *
[blacks and] cannot be
performance."
For example, in order
as the lines of progressi
have specified that as
certain jobs an employee
designated job *outside*
completed a training pr
certain aptitudes, or mu
diploma. All of these re
to *Griggs*. See, *e.g.*, *Pet*
Pipe Co., 494 F.2d 21
(high school diploma); *U*
national Corp., 456 F.2
(prior experience). Peti
is unreasonable, or in co
VII or Section 703(h), t
tion for the employment
the lines of progression p
It is not a sufficient a
gression policy is an a

We can discern or
had for requiring
ployment practic
system, and neit
here.

First, as we ha
Title VII to "des
iority rights of e
seniority system
nation." *Interna*
United States, s
may have been
worked for years
tion that by doin
of obtaining a t
concern is not ma
progression were
before any such

The second pos
justification for
that the seniority
ment is dispense
time served in em
sociation v. *Bryan*
"longevity with a
bama Power Co
(1977))—is of "
bargaining and i
Humphrey v. *Mo*
Trans World Airl
79 (1977); Aaro
and Enforceabilit
Rev. 1532, 1534
and Section 703(
almost universall
benefits among t

No. 914, *supra*, at
often vital to a u
oncile the conflict
(see, *e.g.*, Coope
Under Fair Empl
to Objective Crit
Harv. L. Rev. 15
of a union's role
Ford Motor Co. v
(1953).

Accordingly, C
that to require a
a business necess
central institution
cally, the busine
well suited to just
ciple itself—that i
See generally *Jer*
Local 327, IBEW
1975). The princi
as a criterion lies
eral willingness t
cating scarce ben
supra, 82 Harv. L.

This case, howe
in reconciling em
ing a measure th
mate; nor does
treatment "on the
ployment," *Califo*
supra, 444 U.S. a
a constraint that
in order to serve
virtually concede
[ing]" of seniorit
progression policy

goal of p
Union B
event ob
progressi
qualified
We kn
was inte
of senior
objectives
justified
deed, it i
Congress
importan
scarcely
ing rules
Rec. 654
H.R. Rep
We rec
reflecting

---

[27] The le
ing in the
a cloak fo
Rec. 5423
Union Br.
proponents
lawed by
he made t
that the b
fire, promo
action is n
Indeed, th
practices t
unlawful i
See, *e.g.*, 1
main whol
job candid
fusal to hi
larly, the l

free collectiv
acteristics o
evitably con
"[s]ignifican
and unions
(*California*
598, 608 (1
expectations
seniority sch
embody or e
ployment wi
"exempt [th
tion of Title
extent that
fide, and ar
the "routine
of Teamster
352) of the
Section 703
may have giv
over, even w
is challenged
notably the
which it wou
ness necessit
in other cont

Here, how
adoption of
sembles any
to no legitim
lines of prog
(*Griggs* v. *D*
petitioners sh
as they were
served a busi

Construction Corp. v. *Waters*, 438 U.S. 567, 577 (1978). But there is no reason to allow employees and unions to adopt "artificial, arbitrary, and unnecessary barriers to employment" (*Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431) merely because those barriers "have some nexus to an arrangement that concededly operates on the basis of seniority" (*California Brewers Association* v. *Bryant*, *supra*, 444 U.S. at 608).

3. Petitioners (*e.g.*, Union Br. 28-31; Company Br. 27-31) and amicus (Am. Br. 15, 20 n.18)[28] also argue that unless the lines of progression are immunized from Title VII, employers and unions will be unable to adopt any change in their seniority practices, even a change that would favor minorities, for fear that the entire seniority system will then be challenged as not being sufficiently favorable to minorities (see, *e.g.*, Union Br. 18). Neither we nor the court of appeals suggests that the addition of a single feature—such as the lines of progression—to a seniority system deprives every other aspect of that system of the protection of Section 703(h). The court of appeals carefully distinguished between the lines of progression policy, which it held was not covered by Section 703(h), and the rule providing that an employee forfeited his seniority when he transferred between branches—a rule which the court specifically held was protected by Section 703(h) and therefore was lawful unless not bona fide. App. 142, 145. A challenge to the adoption of an aspect of a seniority system draws into question only that aspect, not other features that were adopted long before. See *California Brewers Association* v. *Bryant*, *supra*, 444

[28] "Am. Br." refers to the brief of Amicus Curiae Equal Employment Advisory Council.

U.S. at 610-611.[29] Similarly, if an aspect of a seniority system is changed, the question raised by a timely challenge to the change is whether that change violates Title VII; the change would not make the entire system liable to reexamination.[30]

II. PETITIONERS' LINES OF PROGRESSION ARE NOT A BONA FIDE ASPECT OF A SENIORITY SYSTEM

Section 703(h) "does not immunize all seniority systems. It refers only to 'bona fide' systems * * *." *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 353. Thus if petitioners' six lines of progression are not a bona fide aspect of their seniority system, the district court was correct in refusing to modify its original injunction against the lines.[31]

---

[29] See Brief for the United States and the EEOC as amici curiae in *Pullman-Standard* v. *Swint* and *United Steelworkers of America* v. *Swint*, Nos. 80-1190 and 80-1193, at 9-10. A copy of this brief has been sent to counsel for the other parties.

[30] Moreover, Section 703(h) does not even become relevant unless a properly challenged aspect of a seniority system has a disproportionately harmful effect on minorities. If a new aspect of a seniority system, or a change in that system, has the effect of favoring minorities in order to overcome prior discrimination, that new aspect does not violate the substantive prohibitions of Title VII even if it is not justified by a business necessity. There is thus no basis for petitioners' suggestion that the Section 703(h) exemption is needed to protect the efforts of employers to modify their employment practices so as to overcome prior discrimination; such efforts are protected because they are not proscribed by any provision of Title VII. See *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979).

[31] We also agree with the court of appeals panel that the lines of progression policy was not an aspect of a seniority system, and is not within Section 703(h) for that reason as

The district court held that the lines of p
sion were not bona fide. Although they deci
case on different grounds, the court of appeal

---

well. The lines of progression policy did not establi
within which seniority was calculated; the seniori
were the two branches, and the amount of time an
had spent in a line of progression was irrelevan
seniority. In this respect the lines of progression po
unlike the distinction between city and over-the-roa
involved in *International Brotherhood of Teamsters* v
States, *supra*; unlike the distinction between tempo
permanent employees at issue in *California Brewers*
tion v. *Bryant*, *supra*, 444 U.S. at 609; and apparentl
the usual line of progression seniority scheme (see, *e.g.*
States v. *Georgia Power Co.*, 634 F.2d 929, 931 (5th Ci
petition for cert. pending *sub nom. Local 84, IBEW* v
States, No. 80-2117; Cooper & Sobol, *supra*, 82 Harv.
at 1602).

Similarly, the lines of progression policy does
lineate how and when the seniority time-clock begins
* * * specify how and when a particular person's
may be forfeited, * * * [or] define which passages
will 'count' towards the accrual of seniority and wh
not." *California Brewers Association* v. *Bryant*, *su*
U.S. at 607 (footnotes omitted). Nor does it "particul
types of employment conditions," such as "vacation ti
job security in the event of layoffs, * * * promotion
assignments" that "will be governed or influenced by
ity." *Ibid.* & n.20.

Moreover, the lines of progression policy, again u
distinction at issue in *California Brewers Association*,
"focus[] on length of employment" (444 U.S. at 610)
ently one day's service in a bottom job was as muc
to an employee as 40 years' service. The only th
tinguishing the lines of progression from, for exa
"educational prerequisite"—which clearly cannot be a
of a seniority system (see *id.* at 609)—is that the
tions required by the lines of progression policy coul
tained only by working in petitioners' plant. But th
cannot justify treating a rule as an aspect of a
system; many other criteria, clearly not aspects of a

and the en banc court of appeals did not quest
this holding. The district judge had presided ove
lengthy trial at which the genesis and impact of
lines of progression, and the possible business just
cations for them, were thoroughly explored. Beca
of the district judge's familiarity with the case,
conclusion that the lines of progression were not b
fide is entitled to some deference. See, *e.g.*, *Day*
Board of Education v. *Brinkman*, 443 U.S. 526,
n.8 (1979). Moreover, the record strongly suppo
the conclusion reached by the district judge. In th
circumstances, the Court may wish to affirm the ju
ment of the court of appeals on the alternative ba
that the six lines of progression are not bona fi
See, *e.g.*, *Dayton Board of Education* v. *Brinkm*
433 U.S. 406, 419 (1977); *Hankerson* v. *North Ca*
lina, 432 U.S. 233, 240 & n.6 (1977); *Dandridge*
Williams, 397 U.S. 471, 475-476 & n.6 (1970).

An aspect of a seniority system "cannot be b
fide if an intent to discriminate entered into
very adoption." *International Brotherhood of Tea*
sters v. *United States*, *supra*, 431 U.S. at 346 n.
See, *e.g.*, *Trans World Airlines, Inc.* v. *Hardison*,
U.S. 63, 82 (1977); *United States* v. *Georgia Po*
Co., 634 F.2d 929 (5th Cir. 1981), petition for c
pending *sub nom. Local 84, IBEW* v. *United Sta*
No. 80-2117; *Hameed* v. *International Association*
Bridge Workers, Local 396, 637 F.2d 506, 516 & n
(8th Cir. 1980).[33] Petitioners concede that until 1

---

system—such as certain aptitude tests (see *ibid.*) or a su
visor's evaluation (see *id.* at 609-610)—might be capabl
being satisfied only by an employee who had already wor
in the employer's plant.

[33] In our Brief for the United States and the EEOC
Amici Curiae in *Pullman-Standard* v. *Swint* and *United St*
workers of America v. *Swint*, Nos. 80-1190 and 80-1193,
discussed the criteria for determining whether a senio

the plants were explicitly segregated
lines in every significant respect. Pron
determined by seniority, but petitione
senior blacks from obtaining the better-p
cation jobs by adopting a rule that stro
aged transfers from the prefabrication
—which had been deliberately kept p
black—to the fabrication departments,
but the least desirable jobs were reserve

In 1963, petitioners, under pressure
ment agencies, dropped this seniority ru
tained only the rule that an employee
seniority when he transferred between b
its face, this new system seemed to promi
blacks could use their seniority to be p
jobs previously reserved for whites. Bu
modified the seniority system with a syst
fications" that relied heavily on the
discretionary evaluations of white supe
sort of subjective decisions that have pr
recurrent source of racial prejudice. Se
ander v. *Louisiana*, 405 U.S. 625, 631-
Rowe v. *General Motors Corp.*, 457 F.
359 (5th Cir. 1972). Not surprising
promotions policy replicated the employn
achieved by the explicitly racial regime.
court and the court of appeals found tha
tions policy, too, was racially discriminat

In 1968, petitioners again came un
from government agencies,[22] and again

---

system is bona fide under Section 703(h) and
between those criteria and the proof of discr
pose under the Equal Protection Clause.

[22] EEOC representatives were involved i
company to change its employment practices in
570-572. The EEOC did not approve the sp

their promotion policy. This time the restri
placed on the pure use of plant seniority
lines of progression. Because of the lines o
sion, four of the most desirable jobs in th
previously all-white jobs—were reserved
ployees who had served in other tradition
jobs. This policy also had a predictable eff
five years and numerous vacancies, the to
mained almost exclusively white. See page
At the same time, between four and five
many blacks as whites were excluded from
of progression entirely, even though the
employed four times as many whites as bl
pages 6-7, *supra*; App. 75). In this way,
of progression "fostered [a] racially stra
environment[] to the disadvantage of mino
ployees]" (*McDonnell Douglas Corp.* v. *G*
U.S. 792, 800 (1973)). "[W]hen the adv
sequences of [an action] upon an identifia
are [clearly] * * * inevitable * * * a stro
ence that the adverse effects were desired ca
ably be drawn." *Personnel Administrator*
chusetts v. *Feeney*, 442 U.S. 256, 279 n.2
See *Village of Arlington Heights* v. *Me*
Housing Development Corp., 429 U.S.
(1977); *Washington* v. *Davis*, 426 U.S. 22
(1976). Here, the persistent racial pattern
obvious and predictable segregative conseq
the lines of progression, create a strong
that petitioners adopted the lines in order
tain that pattern.

---

adopted by the company (see 42 U.S.C. 2000e-12(
Reg. 10270 (1966)), and there is no indication that
was aware of the effects of the lines of progressio
572), so the EEOC representative's presence at
is not evidence that the lines of progression are b

Notably, both the company, v
lines of progression, and the ur
them, had an extensive history
practices. This suggests the pres
ble racial purposes. See *Village o*
v. *Metropolitan Housing Develop*
429 U.S. at 267; *Sears* v. *Benn*
1370-1371, 1373-1374 (10th Cir.
cert. pending *sub nom. United Tr*
v. *Sears*, No. 81-221. While the u
segregated locals—under direct pr
ment agencies (App. 75; J.A. 20
dominated the merged union. Th
cient reason to believe that the c
process, which would ordinarily
interests, adequately protected th
employees in this instance. The n
clusion is that the union and the
a policy that would continue the
teeing that senior white employee
best, traditionally white jobs. A
view of the care with which bot
the union had always preserved
white employees, it is difficult t
district court's apparent conclusi
adopted the lines of progression "
cause of,' not merely 'in spite of'
were likely to continue to give the
See *Personnel Administrator o*
Feeney, *supra*, 442 U.S. at 279.

If the lines of progression poli
stantial legitimate interest, it w
cult to conclude that race entere
to adopt them. But petitioners
ness justification for the lines. A
ers had every incentive to show

progression served a business inter
petitioners established that three li
sion served a business necessity, the
tially no business justification for
issue here (App. 9). The district c
found, in effect, that the six lines d
employer's legitimate interest in 'effi
worthy workmanship.'" *Albemarle*
Moody, *supra*, 422 U.S. at 425, quo
Douglas Corp. v. *Green*, *supra*, 411 U
Dothard v. *Rawlinson*, *supra*, 433 U.
it is difficult to escape the conclusion
district court, that the lines of prog
fact intended to serve the racially se
tives that the company and union
pursued through a variety of other me

---

[24] The issue at trial was not whether th
sion were bona fide but whether they we
performance" within the meaning of *Grig*
Co., *supra*, 401 U.S. at 431. While the *Grig*
ferent from the test that would be used t
lines of progression were bona fide (see *Dot*
supra, 433 U.S. at 328; *International Brot*
sters v. *United States*, *supra*, 431 U.S. at 33
plausible justification for the lines of prog
have helped petitioners meet the *Griggs* tes

[25] The explanation which petitioners did
lines of progression is revealing. A compa
fied that the lines were not the result of a
or any documentary evidence but simply
agement views developed "over the years
In short, the lines of progression reflected
standardless supervisory judgments that
were held to be discriminatory—before the
sion were adopted. See also pages 26-27, no
over, the manager's testimony reinforces t

For these reasons, this
ment of the court of
ground that the district
lines of progression were
not within Section 703(h)

CONC

The judgment of the
affirmed.

Respectfully submitted.

RE
S
WM
A
LA
I
DA
A

CONSTANCE L. DUPRE
Acting General Counsel

PHILIP B. SKLOVER
Acting Associate General C

VELLA M. FINK
Assistant General Counsel

WILLIAM H. NG
Attorney
Equal Employment Opportu

NOVEMBER 1981

---

implicit conclusion that the
because they were another
tional employment patterns

☆ U. S. GOVERN